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Case No. 5495-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUIS PUIG,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 5495-VCN**
	:	
SEMINOLE NIGHT CLUB, LLC, a Delaware limited liability company, MACROVEST SEMINOLE VENTURES, LLC, a Delaware limited liability company, and SEMINOLE CLUB INVESTMENT PARTNERS, LLC, a Delaware limited liability company,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: April 12, 2011
Date Decided: July 29, 2011

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Carolyn S. Hake, Esquire and Andrew D. Cordo, Esquire of Ashby & Geddes, Wilmington, Delaware, and John A. Ross, Esquire and Abram J. Pafford, Esquire of Pafford Lawrence & Ross PLLC, Washington, D.C., Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

This action arises out of Plaintiff Louis Puig's ("Puig") investment in and employment by a nightclub at the Seminole Hard Rock Hotel & Casino in Hollywood, Florida (the "Seminole Hard Rock"). In the First Amended Verified Complaint (the "Amended Complaint"), he seeks rescission of certain contractual agreements he entered into when he invested $400,000 in the nightclub venture.

Defendants Seminole Night Club, LLC ("SNC" or the "Company"), Macrovest Seminole Ventures, LLC ("Macrovest"), and Seminole Club Investment Partners, LLC ("SCIP") have moved to dismiss the Amended Complaint under Court of Chancery Rule 9(b) and Rule 12(b)(6). They contend that dismissal is appropriate because (1) Puig's claims are time barred; (2) the Amended Complaint fails to state a claim for which relief can be granted under either Delaware or New York law; and (3) Puig's claims for equitable relief are barred by various principles of equity, including (i) the Court's inability to return the parties to the *status quo ante*, (ii) Puig's acceptance of benefits under the contractual agreements, (iii) the Amended Complaint's failure to establish that Puig does not have an adequate remedy at law, and (iv) Puig's unreasonable delay in seeking rescission.

II. BACKGROUND[1]

SNC, a Delaware limited liability company, was formed in May 2004 for the purpose of operating a nightclub at the Seminole Hard Rock. Of the Company's three membership classes, SCIP holds all of the Class A interests, Macrovest holds all of the Class B interests, and Puig holds all of the Class C interests. SNC has four directors—Eric H. Douglas ("Douglas"), John S. Nargiso ("Nargiso"), Max B. Osceola III ("Osceola"), and Theodore V. Fowler ("Fowler"). Puig alleges that Macrovest's members are Douglas, Nargiso, and Osceola, while SCIP is controlled by Fowler.

In August 2004, Nargiso approached Puig because of his involvement in the Florida nightclub industry. Nargiso introduced Puig to Douglas, Osceola, and Fowler and solicited his interest in helping to launch a new nightclub at the Seminole Hard Rock. Around that time, Puig also met with Max Osceola, Jr., the Seminole tribal representative for the Seminole Hard Rock. Although he had some reservations based on competition from other nightclubs at the Seminole Hard Rock and the sufficiency of parking at the hotel, Puig ultimately entered into certain agreements to become involved in the project both as an investor and as an operator. In the Amended Complaint, he asserts that that decision was the result of

[1] The factual background is drawn from the well-pleaded allegations in the Amended Complaint ("Am. Compl."). The Court refers to certain undisputed Florida litigation documents for background purposes that are exhibits either to the Defendants' opening brief in support of their motion to dismiss or to the Amended Complaint.

numerous meetings and some purportedly misleading statements regarding regulatory approval of the Seminole Hard Rock's full gambling license and the nightclub's right to remain open later than others at the hotel.

Puig's rights and obligations in the Seminole Hard Rock nightclub venture are memorialized in three documents, all dated September 22, 2004—the SNC amended and restated limited liability company agreement (the "LLC Agreement"), a stock purchase agreement (the "SPA"), and the SNC operating agreement (the "Operating Agreement") (collectively, the "Governing Agreements"). He contends that these three documents jointly "set forth the terms and conditions upon which [he] would develop SNC's multi-level, multi-room night club in the 'Paradise' entertainment section of the [Seminole] Hard Rock named Club Spirits . . . ."[2]

Under the SPA, Puig purchased all of the Class C interests of SNC—a class that affords him neither voting rights nor a seat on the SNC board of directors—for $400,000. Through the Operating Agreement, however, he claims to have certain management rights that govern his ability to develop the nightclub and his terms of employment. Specifically, he contends that the Operating Agreement entitles him to receive a salary of $2,000 per week (in addition to a portion of the nightclub's monthly revenues) for operating the nightclub during the ten-year term of that

[2] Am. Compl. ¶ 11.

agreement and that his employment can only be terminated "for cause," as defined by that agreement.

After executing the Governing Agreements, Puig oversaw the development of the nightclub from some point in 2004 until its public launch in October 2005. He alleges that, although the nightclub became profitable nearly a year later, Fowler—on behalf of SNC—purported to terminate him for cause in a letter delivered around September 28, 2006. Puig contends that no basis for termination was specified in that letter and that he received no prior notice of any breaches, which was required under the Operating Agreement.

Puig suggests that his experiences with SNC are representative of an ongoing trend at the Seminole Hard Rock in business transactions involving Osceola, Nargiso, Douglas, and their affiliates within the Seminole Tribe; specifically, entrepreneurs are fraudulently induced to open businesses at the Seminole Hard Rock and, once they become profitable, the operating principals—like Puig—are removed from those businesses.[3]

Because of his failed business relationship with SNC, Puig filed suit in Florida state court on November 15, 2006, and alleged various causes of action based on the Governing Agreements—Counts III and IV sought analogous relief to

[3] *See id.* ¶¶ 17-20.

that requested here.[4] In its consideration of a motion to dismiss the Florida Complaint, the court appears to have determined that any claims implicating the LLC Agreement had to be brought in Delaware under that agreement's mandatory forum selection clause.[5] Thereafter, Puig filed an amended complaint,[6] which curtailed the number of claims raised but still referenced the LLC Agreement.[7] At an April 2008 hearing before the Florida court, Puig's counsel agreed to withdraw some of the claims asserted in the Amended Florida Complaint.[8] More importantly, in May 2008, the Florida court entered an order dismissing other of Puig's claims that were asserted in that complaint (the "May 2008 Dismissal Order");[9] of relevance to the issues confronted here is the court's dismissal of Count III.[10] That claim, grounded in tortious interference, seemingly implicated the LLC Agreement and, thus, was likely dismissed based on the Florida court's earlier reasoning that the LLC Agreement's forum selection clause required that claim to be brought in this Court.[11] Although some claims in the Amended Florida Complaint were dismissed voluntarily and others were dismissed by operation of

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[4] *See* Defs.' Opening Br. in Supp. of Mot. to Dismiss the First Am. Compl. ("Defs.' Br."), Ex. 1 ("Florida Complaint").
[5] *See id.*, Ex. 2 ("Apr. 10, 2008 Florida Hearing Tr.") at 13-15.
[6] Defs.' Br., Ex. 3 ("Amended Florida Complaint").
[7] *Id.* ¶ 14.
[8] Apr. 10, 2008 Florida Hearing Tr. at 3.
[9] Am. Compl., Ex. B (May 2008 Dismissal Order).
[10] The May 2008 Dismissal Order also dismissed Count IV of the Amended Florida Complaint, which requested relief for alleged false and defamatory comments made about Puig following his termination.
[11] *See* Apr. 10, 2008 Florida Hearing Tr. at 16-18, 24-25.

the May 2008 Dismissal Order, Puig's claims relating to breach of contract and the payment of wages under the Operating Agreement remain viable and are still being litigated before the Florida court.

After the May 2008 Dismissal Order was entered, there appears to have been no further prosecution of the claims implicating the LLC Agreement until this action was filed on May 14, 2010. That filing was preceded by an April 16, 2010 order of the Florida court where Puig was instructed that he "ha[d] thirty (30) days to make th[e Florida] court aware that suit ha[d] been filed or transferred in Delaware or case [sic] will be dismissed."[12] After Puig filed his initial complaint in this action, the Defendants moved to dismiss under Court of Chancery Rules 12(b)(4), 12(b)(5), 12(b)(6), and 23.1. In response, Puig filed the Amended Complaint on November 30, 2010, which is the focus of the Defendants' current motion.

III. ANALYSIS

Before considering the Defendants' other arguments for dismissal, the Court first considers whether the claims raised in the Amended Complaint are time barred.[13]

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[12] Am. Compl., Ex. B (Apr. 16, 2010 Florida Court Order).

[13] It is well-established that, "when the allegations of a complaint show the action was commenced too late, a defendant may properly seek dismissal under the statute of limitations or the doctrine of laches." *In re Coca-Cola Enters., Inc. S'holders Litig.*, 2007 WL 3122370, at *5 (Del. Ch. Oct. 17, 2007).

The Defendants argue that the three-year statute of limitations under 10 *Del. C.* § 8106 applies by analogy to the claims raised here; the Amended Complaint, according to the Defendants, seeks rescission of the SPA and the LLC Agreement because of the Defendants' purportedly fraudulent statements that induced Puig to enter into those agreements. Where fraudulent inducement is alleged, the Defendants contend that the cause of action accrues at the time the misrepresentation induced the execution of the contract. For that reason, they assert that Puig's claims at issue here accrued on September 22, 2004—the date he signed the SPA and the LLC Agreement (along with the Operating Agreement)—and, as a result, the analogous limitations period expired on September 22, 2007. Moreover, although related claims were originally brought in the Florida proceeding, his claims in this action cannot be saved by Delaware's Savings Statute;[14] the Florida court dismissed certain counts related to the LLC Agreement in the May 2008 Dismissal Order and, as a result, any savings period that may have existed expired on May 9, 2009.

In response, Puig asserts that his claims were timely filed and that the Defendants' contentions fail for two reasons. First, because his claims are equitable, and, thus, not directly governed by a limitations period, the Court need not apply the analogous statute of limitations. He suggests that certain factors—for

[14] 10 *Del. C.* § 8118(a) (the "Savings Statute").

example, procedural complexity in the Florida litigation, delay outside of his control, and the lack of prejudice to the Defendants—counsel against applying the analogous limitations period. Second, even if a statute of limitations is applied, this action is saved by the Savings Statute. The May 2008 Dismissal Order, according to Puig, dismissed as a matter of form the claims in the Florida action that were based upon the LLC Agreement. The savings period, however, will not begin to run until a final judgment has been issued in that proceeding—in other words, the one-year period under the Savings Statute, argues Puig, cannot commence until a final judgment is rendered on the contract claims under the Operating Agreement (including a tolling period during the pendency of all appeals) that are still at issue in the Florida proceeding. As a result, Puig contends that "[s]ince the Savings Statute does not begin to run until a final judgment is issued in the underlying litigation, the Delaware complaint was timely filed."[15]

Because the Court does not "blindly apply a statute of limitations to bar equitable claims[,]"[16] a limitations period is not necessarily controlling in an equity action. If the plaintiff seeks equitable relief, however, "it is firmly established that

[15] Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss the First Am. Compl. at 10. Although Puig recognizes that the Florida court's April 2010 order does not guide the Court's application of the Savings Statute, he suggests that that mandate to file in Delaware within thirty days explains why this action was filed on May 14, 2010. *See id.* at 13.
[16] *Coca-Cola Enters., Inc.*, 2007 WL 3122370, at *4.

this Court can and will apply a statute of limitations by analogy."[17] Accordingly, unless there are "some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period."[18]

In this action, Puig's request to rescind the SPA and the LLC Agreement sound in fraudulent inducement. As a result, the Court looks to 10 *Del. C.* § 8106, which applies a three-year statute of limitations to fraud claims.[19] Under Delaware law, a claim for fraud "accrues at the time of the wrongful act, 'even if the plaintiff is unaware of the cause of action.'"[20] For that reason, because the claims raised in the Amended Complaint must have accrued by September 22, 2004—the date that Puig entered into the SPA and the LLC Agreement—the statutory period within which to assert those claims expired by September 22, 2007. Even if the statutory

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[17] *Id.*; *Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 9 (Del. 2009) ("Where the plaintiff seeks equitable relief . . . the Court of Chancery applies the statute of limitations by analogy.").

[18] *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996). There, the Supreme Court observed that the plaintiff had "offered no justification for its delay in bringing suit, and it [was] thus appropriate to apply the statutory period set forth in 10 *Del. C.* § 8106." *Id.* In *Envo, Inc. v. Walters*, 2009 WL 5173807, at *8 (Del. Ch. Dec. 30, 2009), the Court recognized that "[i]n the absence of unusual or extraordinary circumstances, the analogous statute of limitations creates a presumptive time period during which the claim must be filed or else be barred as stale or untimely."

[19] *See Solow v. Aspect Res., LLC*, 2004 WL 2694916, at *3 (Del. Ch. Oct. 19, 2004) (applying the 10 *Del. C.* § 8106 three-year limitations period to claims grounded in fraudulent inducement).

[20] *Smith v. Mattia*, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010) (quoting *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004)); *see also Coca-Cola Enters., Inc.*, 2007 WL 3122370, at *5 ("[A] plaintiff's cause of action accrues at the moment of the wrongful act—not when the harmful effects of the act are felt—even if the plaintiff is unaware of the wrong.").

period was tolled under a recognized exception,[21] the statute of limitations on Puig's claims at issue in the Amended Complaint must have commenced running by November 15, 2006; on that date, he filed his original complaint in Florida state court,[22] which raised claims in Counts III and IV analogous to those filed here. Thus, even assuming that the statutory period was tolled until November 15, 2006, it expired by November 15, 2009, nearly six months before Puig filed suit in this Court on May 14, 2010.

Thus, under the foregoing analysis, the Court concludes that the claims asserted here were not timely filed based on the analogous statutory period. Moreover, Puig's contention that "a number of factors" warrant a determination that any analogous limitations period should be inapplicable is unavailing. Accordingly, the Court turns to whether Puig's claims can be saved by operation of the Savings Statute.

The Savings Statute provides, in relevant part, as follows:

> If in any action duly commenced within the time limited therefor in this chapter, the writ . . . is abated, or the action otherwise avoided or defeated . . . for any matter of form; . . . or if a judgment for the

[21] *See, e.g.*, *Smith*, 2010 WL 412030, at *4 ("There are, however, several circumstances in which the running of the statute of limitations can be tolled. These exceptions include: 1) fraudulent concealment; 2) inherently unknowable injury; and 3) equitable tolling."). If claims are untimely based on the statute of limitations, the plaintiff "bear[s] the burden of pleading specific facts demonstrating that the statute was tolled." *Coca-Cola Enters., Inc.*, 2007 WL 3122370, at *6; *see also Solow*, 2004 WL 2694916, at *3 (observing that the plaintiff had failed to plead specific facts in order to establish tolling of the three-year statute of limitations applicable to his fraud claims).

[22] Am. Compl. ¶ 2.

> plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.[23]

The Savings Statute is a remedial provision that Delaware courts construe liberally so that actions may be decided on the merits, as opposed to procedural technicalities.[24] It "permits refiling of certain actions notwithstanding the statute of limitations when the actions originally were timely filed, but were dismissed as defective in some other respect."[25] Thus, "the statute is designed to allow a plaintiff, within prescribed limitations, one year to file a second cause of action following a final judgment adverse to his position if such judgment was not upon the merits of the cause of action."[26] Assuming the other requirements have been met, the Savings Statute may be applicable (1) whenever the writ has abated or (2) the action was avoided or defeated for any matter of form.[27] A recent decision of the Supreme Court teaches that the Savings Statute "suspend[s] the running of the grace period during the pendency of all appeals . . . ."[28] That then "allow[s] a plaintiff to bring his case to a full resolution in one forum before starting the clock

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[23] 10 *Del. C.* § 8118(a).
[24] *Reid v. Alenia Spazio*, 970 A.2d 176, 180-81 (Del. 2009); *see also Empire Fin. Servs., Inc. v. Bank of New York*, 2001 WL 755936, at *1 (Del. Super. Jan. 12, 2001).
[25] *In re Rich*, 2004 WL 1366978, at *2 (Del. Ch. June 15, 2004).
[26] *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964).
[27] *See Allstaff, Inc. v. Wilmington Trust Co.*, 2010 WL 4056122, at *2 (Del. Super. Sept. 7, 2010), *aff'd*, 16 A.3d 937 (Del. 2011) (TABLE).
[28] *Reid*, 970 A.2d at 181.

on his time to file" in Delaware, which the Supreme Court observed "will discourage placeholder suits, thereby furthering judicial economy."[29]

Turning to the procedural history in the Florida proceeding, the May 2008 Dismissal Order appears to be a form of interlocutory, non-final order under Florida law[30]—it dismisses some, but not all, of the claims raised in the Amended Florida Complaint. Florida's rules of appellate procedure limit a litigant's ability to take an interlocutory appeal from non-final orders.[31] As a result, "a partial dismissal of a complaint is only reviewable when it is established that the dismissed claims are not legally and factually interrelated with the remaining claims."[32] Thus, piecemeal appeals are generally not permitted in Florida.[33]

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[29] *Id.* at 181-82.

[30] *See, e.g.*, *Rollins Fruit Co., Inc. v. Wilson*, 923 So.2d 516, 519-20 (Fla. Dist. Ct. App. 2005) ("A judgment is not final where further judicial labor is required or contemplated to end the litigation between the parties. . . . An order that merely grants a motion to dismiss is not a final order.").

[31] *See* Fla. R. App. P. 9.130(a)(3).

[32] *Harrison v. J.P.A. Enters., L.L.C.*, 51 So.3d 1217, 1219 (Fla. Dist. Ct. App. 2011) (internal quotations omitted); *see also Mass. Life Ins. Co. v. Crapo*, 918 So.2d 393, 394 (Fla. Dist. Ct. App. 2006) (concluding that the appeal was premature because it was "not an appealable partial final judgment under [Florida Rule of Appellate Procedure] 9.110(k)").

It may be worth noting that some Florida courts are of the view that "[a]n order granting a motion to dismiss is not final and not appealable." *Gries Inv. Co. v. Chelton*, 388 So.2d 1281, 1282 (Fla. Dist. Ct. App. 1980). That is because "[t]he judicial labor remaining to be accomplished at the trial court level (upon appropriate application) is an order dismissing the complaint . . . ." *Scott v. Waste Mgmt., Inc. of Fla.*, 537 So.2d 686, 687 (Fla. Dist. Ct. App. 1989); *see also Dedge v. Crosby*, 914 So.2d 1055, 1056 (Fla. Dist. Ct. App. 2005) ("The . . . order grants the defendants' motion to dismiss but fails to actually dismiss the action. Such an order is not final."). *But see Cordani v. Roulis*, 395 So.2d 1276, 1277 (Fla. Dist. Ct. App. 1981) ("[N]otwithstanding a recent decision out of the Third District [of Florida] holding that an order granting a motion to dismiss with prejudice is not a final appealable order . . . we adhere to our conclusion that it is.").

[33] *Harrison*, 51 So.3d at 1219.

Florida Rule of Appellate Procedure 9.130(a)(3)(A), however, authorizes interlocutory appeals from a non-final order relating to dismissal for improper venue.[34] Subsection (b) of that rule further provides that, for a permissible interlocutory appeal to be timely, a litigant must file notice "within 30 days of rendition of the order to be reviewed."[35] Moreover, Subsection (g) specifies that "[t]his rule shall not preclude initial review of a non-final order on appeal from the final order in the cause."[36]

Based on the above examination of Florida law, the non-final May 2008 Dismissal Order was likely immediately appealable—at least in part, and despite Florida's general ban on appealing partial dismissal orders[37]—under Florida Rule

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[34] *Mgmt. Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So.2d 627, 629-30 (Fla. Dist. Ct. App. 1999) (reviewing a timely appeal of a non-final order that denied a motion to dismiss for improper venue where the parties' agreement included a forum selection clause because the court had "jurisdiction to review the order by appeal [under Rule 9.130(a)(3)(A)], even though it d[id] not conclude the litigation"); *Haws & Garrett Gen. Contractors, Inc. of Fort Worth v. Panhandle Custom Decorators & Supply, Inc.*, 500 So.2d 204, 205 n.1 (Fla. Dist. Ct. App. 1986) ("The order on appeal is a non-final, appealable order, in that it is one relating to venue."); *Colin v. Dep't of Transp.*, 423 So.2d 1020, 1020 (Fla. Dist. Ct. App. 1982) ("The [lower court's] order, on its face, is a non-final order concerning venue and subject to interlocutory appeal pursuant to Rule 9.130(a)(3)(A), Florida Rules of Appellate Procedure.").

[35] Fla. R. App. P. 9.130(b).

[36] *Id.* 9.130(g). In *Lidsky Vaccaro & Montes, P.A. v. Morejon*, 813 So.2d 146 (Fla. Dist. Ct. App. 2002), the court observed that a litigant's "failure to seek an appeal [of a non-final, appealable order under Rule 9.130(a)(3)] within thirty (30) days of its rendition did not extinguish its right to appeal the order once a final judgment was entered" in the action. *Id.* at 150. As a result, "failure to utilize the right to take an interlocutory appeal does not restrict the scope of appellate review when the final order is appealed." *Saul v. Basse*, 399 So.2d 130, 133 (Fla. Dist. Ct. App. 1981).

[37] If no exception applied under Florida law, Puig likely could not have immediately appealed the May 2008 Dismissal Order as a partial final judgment because the claims that remain to be litigated in that action arose from an interrelated transaction that involved the same parties and factual circumstances as the claims that were dismissed. *See Harrison*, 51 So.3d at 1219-20.

of Appellate Procedure 9.130(a)(3)(A) because it concerned venue. Nonetheless, regardless of whether it was appealable or not, Puig's ability to appeal that order extinguished thirty days after the order was rendered on May 9, 2008. Although no immediate interlocutory appeal was sought by Puig, the May 2008 Dismissal Order may be reviewed if a future appeal is taken of any final order that may be rendered in the Florida proceeding. Thus, assuming a final judgment is ultimately implemented by the Florida court, Puig may then seek appellate review of the May 2008 Dismissal Order in a plenary appeal of a future final order.

Returning to the Savings Statute, the May 2008 Dismissal Order seemingly fits within the framework of avoiding or defeating the action based on a matter of form because that order dismissed certain of Puig's claims—specifically, Count III of the Amended Florida Complaint—for improper venue based on a forum selection clause in the LLC Agreement.[38] Because that order is non-final and, thus, potentially appealable in the future, however, it seemingly did not cause the Florida action to abate and did not result in a determination in that matter, as is required before the Savings Statute could operate to salvage the claims filed in this

[38] *See Savage v. Himes*, 2010 WL 2006573, at *2 (Del. Super. May 18, 2010) (internal quotations omitted) ("[A]voiding or defeating the action for a matter of form is directed toward instances such as lack of jurisdiction or filing in the wrong venue."); *see also Allstaff, Inc.*, 2010 WL 4056122, at *3 (internal quotations omitted) ("With regard to . . . the avoiding or defeating of the action for any matter of form, Delaware courts have concluded that this prong of the statute is directed toward instances such as lack of jurisdiction or filing in the wrong venue as well as lack of subject matter jurisdiction and technical flaws.").

Court.[39] Accordingly, because the Florida action persists and the May 2008 Dismissal Order was a non-final, interlocutory order, the savings provision in the Savings Statute is not applicable at this juncture. At some future stage, that analysis may change should the duly commenced Florida proceeding abate or result in a final judgment. Although the determination that the Savings Statute is not presently applicable creates a peculiar situation where Puig is, in a sense, both too early and too late in asserting the claims raised in this action, that conclusion is consistent with the Supreme Court's holding in *Reid*, which was based upon the policy of "discourag[ing] placeholder suits, thereby furthering judicial economy."[40]

With the conclusion that Puig's claims (1) were not timely filed within the analogous statutory period and (2) are not saved at this stage by operation of the Savings Statute, the Court will grant the Defendants' motion to dismiss on that basis. For that reason, no further consideration of the other grounds for dismissal raised by the Defendants in their motion is necessary.

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[39] *See, e.g.*, *Gosnell*, 198 A.2d at 926 (recognizing that the Savings Statute affords a plaintiff "one year to file a second cause of action following a final judgment adverse to his position . . . ."); *Empire Fin. Servs.*, 2001 WL 755936, at *2 (holding that "[d]ismissal of the action against [the defendant] . . ., and the subsequent affirmance of that dismissal by the Delaware Supreme Court, abated, i.e., effectively destroyed, the cause of action.").

[40] *Reid*, 970 A.2d at 181-82.

IV. CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss is granted. The claims asserted in the Amended Complaint are time barred and not presently saved by operation of the Savings Statute.

Counsel are requested to confer and to submit an implementing form of order.